

**Issue:** Invested Capital Tax (Long Term Debt)

SYNOPSIS: This matter comes on stipulated facts and memorandum of law, the taxpayer having waived an Evidentiary Hearing, pursuant to the taxpayer's protest of Notices of Tax Liability XXXXX issued by the Department on April 24, 1992, XXXXX issued by the Department on May 29, 1992 and XXXXX issued by the Department on September 23, 1992 for Telecommunications Excise Tax on the charges for detailed billing of cellular telephone calls and Notice of Tax Liability XXXXX issued by the Department on May 13, 1992 and XXXXX issued by the Department on March 19, 1993 for Invested Capital Tax pursuant to the Messages Tax Act. At issue are the questions 1) whether detail billing charges are included within gross charges for purposes of the Telecommunications Excise Tax, 2) whether the taxpayer relied upon previous audits which found that detail billing charges were not taxable and 3) whether the taxpayer is "regulated by the Illinois Commerce Commission" for the purposes of the Invested Capital Tax pursuant to 35 ILCS 610/2 a.1. Following the submission of stipulated facts and taxpayer's memorandum of law it is recommended that issues 1) and 3) be resolved in favor of the Department and issue 2) be resolved in favor

of the taxpayer.

FINDINGS OF FACT:

1. The requirement that the Department of Revenue (hereinafter the "Department") enter its prima facie case under the provisions of 35 ILCS 120/3 and as that section may be incorporated into other taxing acts, was waived by Taxpayer (hereinafter the "taxpayer") by its waiver of an Evidentiary Hearing in this matter.

2. "Taxpayers" have received numerous assessments for periods in 1991 and 1992. (Stipulated Fact 1). Specifically XXXXX under the Telecommunications Excise Tax Act and XXXXX for invested capital tax under the Messages Tax Act.

3. All assessments referred to in paragraph 1 above involve one of the issues described as follows:

a. Assessments XXXXX involve the taxability of receipts received for providing a detailed bill (a charge for additional bookkeeping activities which provides a more specific explanation of charges for taxpayer telecommunications services than appear on the gratuitous, standard bill provided to customers) under the Telecommunications Excise Tax Act.

b. Assessments XXXXX involve responsibility of "Taxpayers" for paying tax on invested capital under the Illinois Messages Tax Act. (Stipulated Fact 2)

4. Taxpayer provides cellular telephone services and ancillary services thereto. (Stipulated Fact 3)

5. During the applicable period of assessment, at issue herein and up to the date of the stipulation, taxpayers are excluded from applicable tariff provisions contained in Article XIII of the Public Utilities Act. (See Docket XXXX: Commission Order issued February 18, 1987). (Stipulated Fact 4)

6. During the applicable period of assessment, at issue herein and up to the date of the stipulation, taxpayers are removed from active regulatory oversight (the most active regulatory oversight being the filing of tariffs), however, taxpayers remain subject to all other applicable provisions of the Public Utilities Act. (Finding number (7) See Docket XXXXX Commission Order issued February 18, 1987). (Stipulated Fact 5)

7. Resellers of cellular service are, competitors of the taxpayer, in that they purchase airtime wholesale from the taxpayer and resell it to businesses and/or individuals. However they are not required to pay Invested Capital Tax and are not "telecommunications carriers" as defined in Section 5/13-202 of the Universal Telephone Service Protection Law of 1985. (220 ILCS 5/13-202) (Stipulated Fact 6)

8. The Department's position on Taxpayers' being subject to regulation of the Illinois Commerce Commission is partially based upon Taxpayers being subject to payment of Public Utility Tax. (Stipulated Fact 7)

9. The Department's regulations provide, in part, as follows:

A retailer may provide services to customers which are not provided in connection with originating or receiving telecommunications. If such services are not necessary for or directly related to the retailer's provision of telecommunications to customers and the charges for such services are disaggregated and separately identified from other charges, the charges need not be included in "Gross Charges" 86 IL. Admin. Code, Sec. 495.100(a). (Stipulated Fact 8)

10. Detailed billing charges on statements provided to taxpayer's customers, are disaggregated and separately identified from other charges. (Stipulated Fact 9)

11. Both Taxpayer B and Taxpayer A underwent Telecommunications Excise Tax audits. Taxpayer B for period from January 1, 1989 thru December 31, 1990. and Taxpayer A for the period December 1, 1987 thru December 31, 1990. In both audits the deductions from gross receipts of

charges for detail billing were not questioned by the Department.  
(Stipulated Fact 10)

CONCLUSIONS OF LAW:

A. Assessments pursuant to the Telecommunications Excise Tax Act 35 ILCS 630/1 et. seq.

Based upon the Findings of Fact, stipulated to by both the taxpayer and the Department, the assessments for Telecommunications Excise Tax for the charges for detail billing of cellular telephone calls cannot stand. The taxpayer was audited by the Department for a three year audit period and relied upon the findings of that audit which excluded the charges for detail billing from the gross charges subject to the tax. This reliance by the taxpayer on the erroneous information given by the Department's auditor and in accordance with the Taxpayers Bill of Rights, 20 ILCS 2520/1 et. seq. the Department must abate the taxes and penalties assessed for detailed billing charges. As soon as the Department revised its ruling on the taxability of such detail billing charges the taxpayer collected and remitted said taxes to the Department. Based upon the foregoing, I recommend that NTLs XXXXX be cancelled.

B. Assessments for Invested Capital Tax imposed by the Messages Tax Act 35 ILCS 610/1 et. seq.

35 ILCS 610/2a.1. provides in pertinent part as follows:

"Imposition of tax on invested capital. In addition to the taxes imposed by the Illinois Income Tax Act, there is hereby imposed upon persons engaged in the business of transmitting messages and acting as a retailer of telecommunications as defined in Section 2 of the Telecommunications Excise Tax Act..., an additional tax in the amount equal to .8% of such persons' invested capital for the taxable period,.... The invested capital tax imposed by this Section shall not be imposed upon persons who are not regulated by the Illinois Commerce Commission or who are not required in the case of telephone cooperatives, to file reports with the Rural Electrification Administration." (Emphasis added)

The taxpayer in its brief contends that they are not regulated by the Illinois Commerce Commission and therefore not subject to the invested

capital tax. In order to determine if the taxpayer is regulated by the Illinois Commerce Commission the various statutes covering the regulation of Telecommunications and Public Utilities must be considered. In P. A. 84-1063, effective January 1, 1986, the State of Illinois enacted the "Universal Telephone Service Protection Law of 1985, which is codified at 220 ILCS 13/100 et. seq.. In its brief taxpayer contends that it is no longer regulated by the Illinois Commerce Commission in light of 220 ILCS 5/13-203, which provides in pertinent part as follows:

"The Commission may, by rulemaking, exclude...(2) cellular radio service...from active regulatory oversight to the extent it finds, after notice, hearing and comment that such exclusion is consistent with the public interest and the purposes and policies of this Article...."

The Order in Docket No. XXXXX dated February 18, 1987 wherein the Illinois Commerce Commission removed the taxpayer from active regulatory oversight. Taxpayer's theory is that the removal of the taxpayer from "active regulatory oversight" is equivalent to the term "not regulated" as that term is used in 35 ILCS 610/2a.1. However, the legislature in 220 ILCS 5/13-101 applies the Public Utilities Act to telecommunications rates and services as follows:

"....Except to the extent modified or supplemented by the specific provisions of this Article, Articles I through V, Sections 9-221, 9-222, 9-222.1, 9-222.2 and 9-250, Articles X and XI of this Act are fully and equally applicable to competitive telecommunications rates and services, and the regulation thereof."

The Illinois Commerce Commission in its order under Docket 85-0477 cited by the taxpayer in its brief clearly finds that the term "active regulatory oversight" is not the same as "deregulation" when it states:

"Section 13-203 authorizes this Commission to remove cellular radio service "from active regulatory oversight." That language suggests this Commission should maintain some level of regulatory oversight over cellular radio service. Section 13-203 further provides that removal from oversight should be "to the extent it finds...such exclusion is consistent with the public interest and the purposes and policies of this Article." The Commission interprets this language as requiring an analysis of the of the

provisions of the Act that apply to cellular radio service and deciding which provisions need not be complied with under the standard set forth in Section 13-203. Support for this interpretation is found in the language of Section 13-103(b), quoted above, which provides that "competition should be permitted to function as a substitute for certain aspects of regulation...." The General Assembly did not direct that competition be allowed to substitute for regulation, only for certain aspects of regulation." (1987 Ill. PUC LEXIS 10 at 50-51)

This quote from the order of the Commission is in response to the Reply Brief submitted by Taxpayer B in the proceedings urging that the Commission should totally deregulate the cellular radio service in that market area. This the Commission refused to do in 1987 and yet the taxpayer still persists in its argument, in the present proceeding that this is what the Commission has done.

Taxpayer also contends that they are no longer subject to the Public Utility Tax pursuant to 220 ILCS 5/2-202 (c). However, in its order dated February 18, 1987 the Commission states:

"There are no other provisions from which cellular radio service should be exempted....Article II establishes the Commission and authorizes its functions. It also provides for the payment of the public utility tax by each public utility subject to the provisions of the Act." (1987 Ill. PUC LEXIS 10 at 56)

Since the Illinois Commerce Commission, which is the interpreter of the provisions of the Public Utilities Act, deems that it retains regulatory authority over cellular radio service pursuant to its enabling legislation, and the legislature has not intervened to remove that regulatory aspect which was laid down in 1987, the legislature would be presumed to understand that decision of the Commission when it amended 35 ILCS 610/2a.1. effective September 6, 1991.

Based upon the foregoing Findings of Fact and Conclusions of Law I recommend that NTLs XXXXX be finalized in their entirety.

Richard A. Rohner  
Administrative Law Judge